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Inc.*

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

DROPLETS, INC.,
Plaintiff,
v.
YAHOO!, INC.
Defendant

Case No. 12-cv-03733-JST (KAW)

**RESPONSE OF YAHOO! INC. AND
OATH INC. / OATH HOLDINGS, INC.
TO DROPLETS, INC.'S MOTION TO
STAY OR CONTINUE TRIAL**

OATH INC. AND OATH HOLDINGS, INC.
Intervenor-Plaintiffs,
v.
DROPLETS, INC.,
Intervenor-Defendant

1 Yahoo is mindful of the Court's remarks regarding the current Covid-19 situation, and Yahoo
 2 believes that the Court's announced health and safety protocols are appropriate. If September 13,
 3 2021 were fully available, Yahoo would be prepared to go to trial on that date. However, because
 4 the September 13, 2021 trial is double-booked with a criminal trial, and because several of Yahoo's
 5 witnesses would have scheduling conflicts if our trial is delayed to later in September, Yahoo does
 6 not oppose a continuance of the trial.

7 Several of Yahoo's witnesses and at least one of its trial counsel would not be available on
 8 January 10, 2022. Yahoo therefore conferred with Droplets after Droplets filed its motion, and the
 9 parties are both available for a trial commencing on any of the following dates, to which the parties
 10 would agree if the Court is available:

- 11 • February 21, 2022;
- 12 • February 28, 2022; or
- 13 • March 7, 2022.

14 If one of these dates works for the Court, then the issues raised by Droplets' motion appear to be
 15 moot. If none of these dates work for the Court, the parties can confer on alternative dates.

16 To be clear for the record, however, Yahoo disagrees with certain of the rationales set forth
 17 by Droplets in its motion for continuance, and Yahoo does not believe that those rationales would
 18 support an additional, future continuance of this case. Indeed, a future continuance of this trial
 19 would be particularly unfair to Defendant Altaba (which no longer owns the Yahoo websites
 20 accused of infringement). Altaba is trying to wind down its company, but currently has \$749
 21 million in assets frozen — the amount of Droplets' damages demand in this case, if trebled — at
 22 Droplets' urging by a Chancery Court in Delaware pending either the resolution of this case or a
 23 further decision of the Chancery Court releasing the assets.

24 Yahoo recognizes that if the Court grants the unopposed continuance, that would at least
 25 postpone the need to resolve the constitutional arguments Droplets presents with respect to (a) the
 26 potential exclusion of unvaccinated persons from the jury venire and (b) the physical presence of
 27 Droplets' CEO, David Berberian, in the courtroom at trial. Nonetheless, Yahoo briefly responds to
 28

1 both arguments below, so that Yahoo’s position is clear on the record, in the event Droplets raises
 2 either or both of these points again in the future or suggests any acquiescence to them by Yahoo.

3 **I. Droplets’ Seventh Amendment and Jury Selection Act Arguments are Incorrect**

4 As an initial matter, the seven counties at issue have some of the highest adult vaccination
 5 rates in the country, with each county reporting adult vaccination rates of over 74%.¹ Against this
 6 background of widespread vaccinations, Droplets’ motion invokes the Seventh Amendment to
 7 allege the “systematic and intentional exclusion” of certain jury members. ECF No. 866 at 7.

8 To evaluate such an allegation, the Supreme Court has articulated—and the Ninth Circuit
 9 has followed—a three-part standard. Under that test, Droplets, as the objector, must make a *prima*
 10 *facie* showing: (1) of a protected group that “qualifies] as ‘distinctive’”; (2) that this group “is not
 11 fairly and reasonably represented in jury venires”; and (3) that “‘systematic exclusion’ in the jury-
 12 selection process accounts for the underrepresentation.” *Berghuis v. Smith*, 559 U.S. 314, 327
 13 (2010) (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). The back-of-the-envelope math
 14 presented in Droplets’ motion does not satisfy either the second or third *Berghuis-Duren* factors.

15 Under the second factor—whether a protected class is “fairly and reasonably represented in
 16 jury venires”—Droplets’ calculation would not survive a *Daubert* challenge. The individual
 17 conducting the calculation, Ms. Falkenstein, is not a statistician and does not purport to have any
 18 statistical training or background. The calculations on their face reveal methodological flaws. For
 19 example, the data purports to show the number of “fully vaccinated people in venire” and “non-
 20 fully vaccinated people in venire.” ECF No. 866 at 5 (quoting table labels, emphasis added). But
 21 the source data is California state data regarding all vaccine-eligible residents in the counties (*i.e.*,
 22 all residents over age 12), not those individuals who qualify for jury service. For example, the
 23 dataset includes minors between the ages of 12 and 17 who are vaccine-eligible but are
 24 disqualified from jury service in all cases. Nor does Droplets’ analysis control for additional
 25 disqualifying factors like citizenship status.

27 ¹ This data is publicly available on the California’s government’s “Vaccination Progress Data” site,
 28 at <https://covid19.ca.gov/vaccination-progress-data/#overview>. This is the same source on which
 Droplets relies in its motion. See ECF No. 866 at Ex. D (footnotes).

In a footnote, Droplets asserts that the data for the “eligible jury pool...is likely comparable to the vaccination rates for residents of that race overall” (ECF No. 866 at 5 n.3), but that is conjecture. Taking Alameda County as one illustrative example, only 65.5% of eligible 12-17 year olds in the county are fully vaccinated, whereas, around 79.5% of the adult population is fully vaccinated.² This could materially impact the summary vaccination percentage numbers displayed in the summary table on page 5 of Droplets’ motion, particularly if the percentages of 12-17 year olds in each of the various racial or ethnic groups is different than the percentages of 18+ year olds in each of those groups. The record lacks a clear answer to that question, however, because Droplets has not undertaken such a statistical analysis.

Turning to the third *Berghuis-Duren* factor—that “systematic exclusion in the jury-selection process accounts for the underrepresentation”—Droplets’ arguments again fail. The Ninth Circuit authority Droplets cites teaches that “[t]o be systematic, underrepresentation must be ‘due to the system’ by which the juries were selected.” *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1165 (9th Cir. 2014) (quoting *Randolph v. California*, 380 F.3d 1133, 1141 (9th Cir. 2004), *in turn quoting Duren*, 439 U.S. at 364) (emphasis in original).

An example of a deficient system occurred in the *Duren* case, where “women, but not men, could opt out of jury service by so indicating on the juror questionnaire.” *Hernandez-Estrada*, 749 F.3d at 1165. In contrast, in *Randolph*, the Ninth Circuit approved a challenged system and rejected a statistical argument that “Hispanics return questionnaires at a lower rate than the general population”; according to the Ninth Circuit, the objector had “not shown any relationship between the disproportionately low percentage of Hispanics in the venire and the juror-selection system the County uses.” *Randolph*, 380 F.3d at 1141. Likewise, in *Hernandez-Estrada*, the Ninth Circuit rejected the argument that the use of “voter registration lists” to assemble a jury venire constituted a system of exclusion under the third *Berghuis-Duren* factor because it incidentally led to “underrepresentation of African Americans and Hispanics in the qualified juror pool”:

² See <https://covid19.ca.gov/vaccination-progress-data/> (providing fully vaccinated rate for 12-17 years old). To calculate the fully-vaccinated rate for adults, we aggregated the results for the 18-49, 50-64, and 65+ age groups.

1 Here, while Hernandez has introduced significant evidence regarding
 2 underrepresentation of African Americans and Hispanics in the
 3 qualified juror pool, he has failed to provide evidence that this
 4 underrepresentation is due to the system employed in the Southern
 5 District, and has therefore failed to establish a *prima facie* case under
 6 *Duren*.

7 *Hernandez-Estrada*, 749 F.3d at 1166.

8 Here, Droplets' arguments are even weaker than those in *Hernandez-Estrada* and *Randolph*.
 9 Droplets' motion does not point to any defects in the actual jury selection process this Court may
 10 use, as part of accounting for vaccination status, let alone demonstrate that such procedures would
 11 in fact systemically cause the exclusion of protected Hispanic or African-American jury-eligible
 12 county residents. For instance, in selecting the jury pools in this case from the venire, this Court
 13 could in its discretion take actions such as offsetting vaccination-based exclusions from a
 14 particular race or ethnicity with their replacement by vaccinated members of that same race or
 15 ethnicity.

16 At the very least, Droplets' contention with regard to the "systematic exclusion" factor is
 17 premature. Droplets' counsel had it right at the August 26 pretrial conference, when counsel
 18 acknowledged that the preferable time to address this issue is after the parties actually see the jury
 19 venire: "And we think reading the case law – if we have an objection, it will be needed to be made
 20 once we see the jury venire and engage whether it's a fair cross-section of the community." ECF
 21 No. 865, Transcript of August 26, 2021 Pretrial Conference, at 14.

22 **II. Droplets' Arguments Regarding its CEO David Berberian Do Not Raise Due Process 23 Concerns**

24 Droplets repeatedly invokes "Due Process" in asserting the purported importance of having
 25 its CEO, David Berberian, physically present in the courtroom, despite his unvaccinated status.
 26 Droplets is certainly allowed under Rule 615 to exempt a designated corporate representative from
 27 sequestration, but that evidentiary rule does not confer on Droplets the constitutional right to have
 28 Mr. Berberian live in the courtroom at trial. *See Kulas v. Flores*, 255 F.3d 780, 786 (9th Cir. 2001)
 29 ("In a civil suit, the parties do not have a constitutional right to be personally present during
 30 trial."). The cases cited by Droplets—all of which are from outside of the Ninth Circuit—do not

1 hold that a corporate plaintiff has a Due Process right to have the representative of its choice
 2 physically present in the courtroom. To the contrary, where a corporate plaintiff is represented by
 3 counsel in a civil case, as Droplets is here, a constitutional right to be physically present does not
 4 attach. *See id.* (where a party is represented by counsel, “[t]here is no constitutional right of a
 5 litigant to be personally present during the trial of a civil proceeding,” quoting *Faucher v.
 6 Lopez*, 411 F.2d 992, 996 (9th Cir. 1969)); *United States v. Alisal Water Corp.*, 431 F.3d 643, 658
 7 (9th Cir. 2005) (“the Confrontation Clause is not applicable to civil cases,” quoting *U.S. Steel,
 8 LLC, v. Tieco, Inc.*, 261 F.3d 1275, 1287 n.13 (11th Cir. 2001)).

9 Moreover, there are multiple options to mitigate Droplets’ concerns. Mr. Berberian could
 10 testify by Zoom, as likely other witnesses will, and the Court could instruct the jury as to why Mr.
 11 Berberian could not testify live or be Droplets’ corporate representative (and/or Droplets could
 12 also develop that same explanation on direct examination). Either or both of these would eliminate
 13 any juror confusion as to why he is not present in person. Droplets could also designate one of its
 14 other executives or officers as its corporate representative, such as Droplets’ current CFO Ingo
 15 Theuerkauf, who is on Droplets’ witness list and is thoroughly familiar with Droplets and its
 16 history—in fact, he recruited Mr. Berberian to the company. Mr. Theuerkauf has also been
 17 intimately involved with all of Droplets’ litigations, including the present one.

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1 Respectfully submitted,

2 /s/ Meghan C. Killian
3 Meghan C. Killian

4 Dated: September 2, 2021

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1 **CERTIFICATE OF SERVICE**

2 This is to certify that a true and correct copy of reply brief for **RESPONSE OF YAHOO!**
3 **INC. AND OATH INC. / OATH HOLDINGS, INC. TO DROPLETS, INC.'S MOTION TO**
4 **STAY OR CONTINUE TRIAL** was served by ECF on all counsel of record on this the 2nd day of
5 September 2021.

6 */s/ Meghan C. Killian*
7 Meghan C. Killian

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